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No._____

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

October Term, 1986

A. ADAM, EDWARD M. BAK, R. BOSTWICK, VINCENT C. CALLEA, DENNIS DRABEK, DONALD FACHKO, STEPHEN D. FACHKO, J. FARRIS, ADOLPH J. FRANKI, ALBERT P. HECK, ROBERT J. HORSLEY, E. JONES, S. JOZWIAK, BRONISLAUS KOSINSKI, LOUIS KRAUSE, G. KRETZ, DANIEL C. KWAIZER, H. KWIATKOWSKI, RICHARD H. KWIATKOWSKI, E. LUNDERMAN, S. LUSIAK, G. E. MALE, ARTHUR J. McARTHUR, THEODORE J. MICHALSKI, JAMES MONTONDO, RICHARD V. NOWAK, RICHARD N. NUNZ, NORBERT A. ORLOWSKI, FLOYD D. OSTOLSKI, RAYMOND J. OSUCH, ALOIS T. OWCZARCZAK, ARTHUR H. POST, DANIEL J. PRZYWUSKI, DAVID A. SAWICKI, V. STACHEWICZ, THOMAS R. SADOWSKI, JOHN L. SZATKOWSKI, E. SZYMENDERA, PHILIP M. TADARO, JR., NORMAN VANINDERSTINE, MICHAEL C. WALCZAK, MATTHEW F. WAS, FRED F. WOZNIAK, NORMAN J. ZIOMEK,

Petitioners,

vs.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, TRANSPORT WORKERS UNION OF AMERICA, CONSOLIDATED RAIL, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

I. Whether the adequacy of representation provided the Petitioners by the Brotherhood Railway Carmen of the United States and Canada is a genuine issue of material fact which should be fully litigated before a jury?

II. Whether the Transport Workers Union of America and Consolidated Rail, Inc., conspired together with the Brotherhood Railway Carmen of the United States and Canada to promote the closure of former Erie Lackawanna Railroad yards thereby forcing the Petitioners to be furloughed?

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IN THE

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No._____

A. ADAM, EDWARD M. BAK, R. BOSTWICK, VINCENT C. CALLEA, DENNIS DRABEK, DONALD FACHKO, STEPHEN D. FACHKO, J. FARRIS, ADOLPH J. FRANKI, ALBERT P. HECK, ROBERT J. HORSLEY, E. JONES, S. JOZWIAK, BRONISLAUS KOSINSKI, LOUIS KRAUSE, G. KRETZ, DANIEL C. KWAIZER, H. KWIATKOWSKI, RICHARD H. KWIATKOWSKI, E. LUNDERMAN, S. LUSIAK, G. E. MALE, ARTHUR J. McARTHUR, THEODORE J. MICHALSKI, JAMES MONTONDO, RICHARD V. NOWAK, RICHARD N. NUNZ, NORBERT A. ORLOWSKI, FLOYD D. OSTOLSKI, RAYMOND J. OSUCH, ALOIS T. OWCZARCZAK, ARTHUR H. POST, DANIEL J. PRZYWUSKI, DAVID A. SAWICKI, V. STACHEWICZ, THOMAS R. SADOWSKI, JOHN L. SZATKOWSKI, E. SZYMENDERA, PHILIP M. TADARO, JR., NORMAN VANINDERSTINE, MICHAEL C. WALCZAK, MATTHEW F. WAS, FRED F. WOZNIAK, NORMAN J. ZIOMEK,

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Adam, *et al.*, the Petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on November 21, 1986.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is unreported and is printed in Appendix A hereto, 1a. The judgment of the United States District Court for the Western District of New York is printed in Appendix B hereto, 5a.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit (Appendix A, 1a) was entered on the 21st day of November, 1986. The jurisdiction of the Supreme Court is invoked under section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. Section 185).

Statutes Involved

The text of the following statutes relevant to the determination of the present case are set forth in the appendices: Regional Rail Reorganization Act of 1973, Title V, Pub. L. No. 93-236, Section 505, 87 Stat. 1012, 1015-1019 (1974); 45 U.S.C. Section 701 (1974); Northeast Rail Services Act of 1981, Title VII, Pub. L. No. 97-35, Section 701, 95 Stat. 661 (1981); 45 U.S.C. Section 797(a), (d) (1981).

Statement of Case

The Petitioners commenced this action on June 13, 1983 with the filing of a complaint with the United States District Court for the Western District of New York. Petitioners brought this action under, and jurisdiction is conferred on the United States Federal Courts by virtue of section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. §185).

Petitioners in this matter are forty-four members of the Brotherhood Railway Carmen of the United States and Canada (hereinafter referred to as BRC). All of the Petitioners are former members of the Erie Lackawanna Railroad which became part of Consolidated Rail, Inc. (hereinafter referred to as Conrail), on April 1, 1976. Respondent, BRC, is a Union and a Labor Organization which represented the Petitioner-Carmen in collective bargaining when Petitioners were formerly employed at the Erie Lackawanna Railroad. Respondent, Transport Workers Union of America (hereinafter referred to as TWU), is a Union and Labor Organization which represents employees formerly employed at the Penn Central Railroad in collective bargaining. Both BRC and TWU are collective bargaining units of Respondent Conrail.

On December 5, 1975, the Respondents and BRC local representatives entered into an agreement with the consent, knowledge and approval of Petitioners which provided procedures for determining seniority rights of employees of the former Erie Lackawanna Railroad and the Penn Central Railroad within the same regional district (hereinafter referred to as "Prior Rights Agreement"). When the agreement was entered into by the local BRC representative, the Petitioners were entitled to benefits pursuant to Title V of the Regional

Rail Reorganization Act (hereinafter referred to as Title V), which, in effect, protected Petitioners who were deprived of employment at Conrail by guaranteeing them a life-time wage. This provision contained in Title V was an intricate part of the "Prior Rights Agreement."

The agreement established eighteen district seniority rosters throughout the Conrail system, and it provided that all carmen within the district shall be placed on a combined district roster which listed carmen by the chronology of their seniority date they held on a pre-Conrail railroad. This procedure is commonly referred to as "dove tailing." This agreement preserved to each employee an absolute right to perform future work assigned at his pre-Conrail location over employees who were assigned to the other locations, regardless of the competing-employees' initial railroad hiring date. This arrangement is commonly referred to as "prior rights seniority." For example, this allowed former Erie Lackawanna Railroad employees first rights to jobs at former Erie Lackawanna facilities. Similarly, former employees of the other railroads that merged into Conrail had first rights to jobs of the facilities at their former railroads.

Subsequent to the "Prior Rights Agreement" all Erie Lackawanna yards in the Buffalo, New York area were closed under the consolidation. The Petitioners herein were furloughed when their yards were closed and were prevented from obtaining employment in other yards because of the "Prior Rights Agreement".

On August 13, 1981, Congress repealed Title V and passed Title VII, also known as the Northeast Rail Services Act of 1981, Pub. L. 97-35, which terminated the life-long wage protection provision which was bestowed upon the Petitioners by Title V in 1973. Title VII now provided that a furloughed Conrail employee

could only collect his statutory unemployment benefits plus forty-two dollars per day, up to a maximum of twenty thousand dollars. When a furloughed employee reached this ceiling, he could no longer collect any benefits under Title VII. 45 U.S.C. §797(a), (d).

When the Northeast Rail Services Act was passed and the wage protection provision terminated, the furloughed former Erie Lackawanna Railroad carmen began contacting various BRC officials and demanded that the Respondents attempt to renegotiate the prior seniority rights system in order that the Petitioner-carmen also be "dove-tailed" into existing Conrail operations, as had been done with other railroad crafts after the enactment of Title VII.

All of the Petitioners' attempts to renegotiate the prior seniority rights system and to be dove-tailed into the existing Conrail system have been unsuccessful. As a result, carmen with less seniority than your Petitioners are presently earning their livings with the railroad, whereas your Petitioners are, for the most part, jobless. Because the Petitioners were not dove-tailed into the existing Conrail system they bring this action against the Respondents.

On July 9, 1986, judgment was entered upon the order of United States District Court Judge John T. Curtin granting the Respondents' motion for Summary Judgment and dismissing the Petitioners' complaint without costs.

On November 21, 1986, the judgment of the District Court was affirmed upon the order of the United States Court of Appeals for the Second Circuit.

We seek review of the affirmance of the granting of Respondents' summary judgment motion, and an outright reversal of that decision.

Reasons for Granting Writ

1. The Petitioners herein pray that this writ be granted because there exists an important question of Federal Law which has not been, but should be, settled by this Court. The courts below granted and affirmed the Respondents' motion for summary judgment. Petitioners assert that the question of adequacy of representation by a union to its members should be a question of fact to be determined only after all available evidence has been presented to a jury. Therefore, the lower court's granting of summary judgment should be reversed.

2. There exists genuine issues of material fact regarding the adequacy of representation provided the petitioners by BRC. In 1967, this Court held that fair representation obligates a Union to treat its members in a manner which is neither arbitrary, discriminatory nor in bad faith. *Vaca v. Sipes*, 386 U.S. 171 (1967).

It is the Petitioners' contention that their Union, BRC, violated the standard set forth in *Vaca* when it failed to renegotiate the Union's prior seniority system following the enactment of Title VII. As a result, the Petitioners lost their seniority rights and were not dove-tailed into the present Conrail system following the consolidation.

There exists substantial questions of material fact which will illustrate that the *Vaca* standard was not adhered to. This substantial evidence will and can only be shown by allowing a complete and equitable litigation of this matter before a jury. Therefore, the granting of the Respondents' motion for summary judgment by the courts below was in error and the petitioners pray for review of those decisions by this Court.

3. When Congress repealed Title V and enacted Title VII in 1981 it vastly undercut salary protection. The enactment of Title VII deprived the Petitioners of their salary protection guaranteed under Title V.

The Petitioners' contend that the courts must construe the evidence regarding the interrelationship of Title V and the seniority agreement in its most favorable light in favor of the party opposing the motion for summary judgment. *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962). The District Court failed to adher to the standard of *Bohn*, therefore the petitioners seek review of this court consistent with that standard.

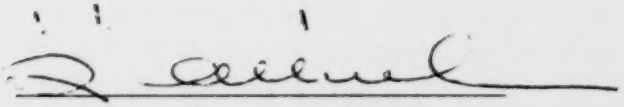
4. The issues as to whether a conspiracy existed among the Respondents can only properly be determined by presenting all available evidence to a jury. Therefore, it was improper for the courts below to grant summary judgment in favor of Respondents.

Conclusion

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

THIELMAN & THIELMAN



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* *Counsel of Record*

Dated: February 11, 1987

APPENDIX A

Order of the United States Court of Appeals for the Second Circuit, November 21, 1986

[1] UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit, held in the United States Courthouse in the City of New York on the 21st day of November, one thousand nine hundred and eighty-six.

PRESENT: HON. J. EDWARD LUMBARD,
HON. LAWRENCE W. PIERCE,
Circuit Judges,
HON. KEVIN T. DUFFY,
District Judge.

United States Court of Appeals
Filed
NOV 21 1986
Elaine B. Goldsmith, Clerk
*Second Circuit

A. ADAM, EDWARD M. RAK, R. BOSTWICK, VINCENT C. CALLEA, DENNIS DRABEK, DONALD FACHKO, STEPHEN D. FACHKO, J. FARRIS, ADOLPH J. FRANKI, ALBERT P. HECK, ROBERT J. HORSLEY, E. JONES, S. JOZWIAK, BRONISLAUS KOSINSKI, LOUIS KRAUSE, G. KRETZ, DANIEL C. KWAIZER, H. KWIATKOWSKI, RICHARD F. KWIATKOWSKI, E. LUDERMAN, S. LUSIAK, G.E. MALE, ARTHUR J. McARTHUR, THEODORE J. MICHALSKI, JAMES MONTONDO, RICHARD V. NOWAK, RICHARD N. NUNZ, NORBERT A. ORLOWSKI, FLOYD L. OSTOLSKI, RAYMOND J. OSUCH, ALOIS J. OWCZARCZAK, ARTHUR H. POST, DANIEL J. PRZYWUSKI, DAVID A. SAWICKI, V. STACHEWICZ, JOHN L. SZATKOWSKI, E. SZYMENDERA, PHILLIP M. TADARO, JR., NORMAN VANINDERSTINE, MICHAEL C. WALCZAK, MATTHEW F. WAS, FRED F. WOZNIAK, NORMAN J. ZIOMEK,

Plaintiffs-Appellants,

vs.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA
TRANSPORT WORKERS UNION OF AMERICA,
CONSOLIDATED RAIL, INC.,

Defendants-Appellees.

* Hon. Kevin T. Duffy, Judge, United States District Court for the Southern District of New York, sitting by designation.

Appendix A—Order of the United States Court of Appeals for the Second Circuit, November 21, 1986.

ORDER
86-7644

[2] Appeal from an order of summary judgment in the United States District Court for the Southern District of New York (Curtin, Ch. J.), dismissing appellants' complaint in an action arising under the Railway Labor Act, 45 U.S.C. §151, *et seq.* (1982).

Appellants are 44 individuals who were employed as carmen by the Erie Lackawanna Railroad ("EL"). The EL was merged into Consolidated Rail Corporation ("Conrail") in 1976. Defendant Transport Workers Union of America ("TWU") represents Penn Central Railroad ("Penn Central") employees, which also merged with Conrail in 1976. In 1975, Brotherhood Railway Carmen ("BRC"), which represented EL employees, and TWU negotiated an agreement with Conrail containing a "prior rights" clause. The prior rights agreement guaranteed a pre-Conrail employee the right to work at his former location even though an employee who worked for another predecessor railroad may have had greater seniority. In this case, since all of the EL facilities eventually closed, this had the effect of giving Penn Central employees hired after EL employees greater seniority rights than the EL employees.

Prior to August, 1981, the prior rights clause was not a hardship to the former EL employees because Title V of the Regional Rail Reorganizations Act of 1973, 45 U.S.C. §771 *et seq.* ("Title V"), established a lifetime wage benefit for workers laid off by Conrail. In August, 1981, however, Congress enacted the Northeastern Rail Service Act, 45 U.S.C. §1101, *et seq.* (1981) (repealing

Title V) ("NRSA"), which limited furloughed rail worker's benefits to unemployment benefits plus $42 per day, up to a lifetime maximum of $20,000. Appellants allege that BRC breached its duty of fair representation after NRSA was enacted by failing to renegotiate the 1975 agreement to eliminate the prior rights clause. Further, appellants claim that Conrail, TWU, and BRC conspired to close the EL facilities, resulting in financial hardship to appellants after the enactment of NRSA.

Having viewed the facts in the light most favorable to appellants, as we must do when reviewing a summary judgment order, *Falls Riverway Realty, Inc. v. City of Niagara Falls*, 754 F.2d 49, 54 (2d Cir. 1985), we nevertheless agree with the conclusion of the district court that the appellees were entitled to summary judgment. BRC had no duty to renegotiate the 1975 agreement after the enactment of NRSA because the negotiation of the prior rights clause had nothing to do with the wage protections then contained in Title V. Further, it is clear from the record that the decision to close the EL facilities was made solely by Conrail based on economic considerations. Therefore, appellants' contention that Conrail, BRC and TWU conspired to close these facilities is without merit.

[3] We therefore affirm the judgment of the district court.

J. Edward Lumbard,
HON. J. EDWARD LUMBARD,

Lawrence W. Pierce,
HON. LAWRENCE W. PIERCE,
Circuit Judges,

Kevin T. Duffy,
HON. KEVIN T. DUFFY,
District Judge.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX B

Decision of the United States District Court for the Western District of New York, July 9, 1986.

[1] UNITED STATES DISTRICT COURT
Western District of New York

A. ADAM, *et al.*,

Plaintiff(s),

v.

BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, *et al.*,

Defendant(s).

CIV-83-582C

SIR/MADAM: Take notice of DECISION & ORDER, and JUDGMENT of which the within is a copy, duly granted in the within entitled action on the 9th day of July, 1986, and entered in the Office of the Clerk of the United States District Court, Western District of New York on the 9th day of July, 1986.

Dated: Buffalo, New York
July 9, 1986

EDWARD P. GUETH, JR., Clerk
U.S. District Court
Western District of New York
U.S. Courthouse
Buffalo, New York 14202

TO: Phillip A. Thielman, Esq.
Erick J. Genser, Esq.
Norman E. S. Greene, Esq.
Malcolm A. Goldstein, Esq.
Robb M. Jones, Esq.
Jeffrey H. Burton, Esq.

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[2] The plaintiffs allege that, in 1975, BRC negotiated a disadvantageous agreement with Conrail and TWU. This agreement established the seniority rights of railroad workers, including those working at former Penn Central and EL facilities. This agreement was necessitated by the impending merger of the Penn Central, the EL, and several other financially troubled railroads into the Conrail Corporation. *See* Regional Rail Reorganization Act of 1973, 45 U.S.C. §701, *et seq.*

The statutory network governing the establishment and operations of Conrail required Conrail to negotiate an agreement such as that negotiated with BRC and TWU. 45 U.S.C. §774. Specifically, the statute said that "prior seniority rights" were to be preserved to the extent possible.

As was stated in this court's March 4, 1985, order, "prior rights" is a concept well known in the railroad industry. It gives a worker hired by one railroad company after a second worker was hired by another company greater seniority at facilities operated by his former company after a merger of the two companies.

In the instant case, the plaintiffs had prior rights on EL facilities, but eventually, all EL facilities were closed while those of Penn Central were maintained. This resulted in former EL workers with greater seniority [3] being unable to displace former Penn Central workers with less seniority at the yards Conrail kept in operation.

The impact of prior rights agreements was less severe prior to August, 1981, because Title V of the Regional Rail Reorganizations Act established a lifetime wage

benefit for workers laid off by Conrail. Title V was repealed effective August 13, 1981, when Congress enacted the Northeastern Rail Service Act [NRSA], Pub.L. No. 97-35, 95 Stat. 644-87 (1981), 45 U.S.C. §1101, *et seq.* Congress specifically found that the fiscal burden imposed by the Title V wage benefit was "excessive." 45 U.S.C. §1101(4). Consequently, NRSA limited furloughed rail workers' benefits, plus $42.00 a day, up to a maximum lifetime limit of $20,000.00.

The combination of the 1975 prior rights agreement, the closing of former EL facilities, and the enactment of NRSA resulted in the furlough of these plaintiffs. They contend that their union failed to seek an end to prior rights when NRSA and the EL shutdowns brought financial hardship upon them. They charge Conrail, TWU, and BRC of conspiring to bring about this result.

Defendants individually oppose plaintiffs' charges in all respects and move for summary judgment as a matter of law on the grounds that there are no genuine issues of material fact in this case.

[4] BRC argues that prior to the formation of Conrail, defendant BRC was the exclusive bargaining representative for carmen employees who were employed on all of the railroads that eventually were combined to form Conrail, with the exception of Penn Central. Defendant TWU represented those carmen employed on Penn Central. With the passage of the Regional Rail Reorganization Act, BRC and TWU agreed to form a "Joint Council" and bargain as one entity for all carmen at Conrail. At the same time, the employees retained their membership in their separate respective unions.

Appendix B—Decision of the United States District Court for the Western District of New York, July 9, 1986.

The BRC/TWU Joint Council thereafter met with Conrail representatives and negotiated a "single implementing agreement" in 1975 which, *inter alia*, provided that the carman seniority rosters of the bankrupt railroads should be incorporated into new Conrail district seniority rosters on the basis of each employee carman's seniority date on his pre-Conrail railroad. Subsequently, Joint Council and Conrail representatives met and reached an agreement on December 5, 1975, setting forth the seniority rights of all Conrail carmen. The agreement preserved to each employee an absolute "prior rights seniority" to perform any future carman work assigned to his pre-Conrail location over carmen who were employed at other locations, regardless of the competing employees' initial railroad hiring dates.

[5] BRC says that the seniority rights conferred on the employees of the bankrupt railroads by the agreement of December 5, 1975, followed the common practice in the railway industry for combining seniority rosters and that the concept of prior rights had been implemented in various other railroad mergers and combinations dating back several years. Further, BRC argues that most labor organizations involved opted for a seniority system involving prior rights.

BRC argues, further, that Title V of the Regional Rail Reorganization Act was an entity completely separate from the Prior Rights Agreement and has no effect on the seniority rights of employees.

BRC also claims that the decision to close the various EL railroad yards was made by Conrail management and was motivated solely by a desire to achieve a more efficient system in light of the declining economic health of area shippers. BRC says that, in every case, no negotiations or consultations were conducted with any of the unions representing Conrail employees prior to the decision to close those yards. BRC says that neither BRC nor TWU had any input in determining which Conrail yards would be affected.

BRC also contends that, about the time the Northeastern Rail Service Act was to be passed, [6] plaintiffs—who had been or were about to be laid off because of the various yard closings—began contacting various BRC and TWU officials demanding that the prior rights agreement be renegotiated to eliminate prior rights seniority so that they could displace junior employees in the former Penn Central yards that were kept open.

BRC believes that because the seniority arrangements contained within the prior rights agreements were negotiated independently of the Title V protections and were not considered to be affected in any way by those protections, the repeal of Title V in 1981 did not, in BRC's view, have any impact on the wisdom or propriety of the seniority arrangements set forth in that earlier agreement. BRC's position in the face of plaintiffs' demands is that the seniority arrangement established in the Prior Rights Agreement was a fair and equitable system, applying equally to all Conrail carmen.

BRC contends that, during the period plaintiffs sought renegotiation of the Prior Rights Agreement, there were approximately 20 BRC lodges throughout the Conrail system. Of these, only one other local lodge—in addition to plaintiffs—desired that prior rights seniority be eliminated. Therefore, BRC informed plaintiffs that the Prior Rights Agreement should be preserved, and with that, TWU has agreed. BRC also points out that this issue was [7] addressed internally and by the BRC Grand Lodge Convention of August 1983, which denied plaintiffs' appeal. Finally, BRC argues that, despite its position in response to plaintiffs' demands about prior rights, BRC has satisfactorily represented plaintiffs in many other ways.

TWU essentially agrees with BRC's position. It argues, on its own behalf, that plaintiffs never belonged to the TWU during any time relevant to this lawsuit and the TWU never represented plaintiffs at Conrail for purposes of protecting seniority they earned as EL carmen.

Further, TWU says that it did not conspire with BRC or Conrail to deprive plaintiffs of their seniority and, in fact, that there was no conspiracy surrounding defendants' failure to amend the Prior Rights Agreement either before or after the passage of Title XVII in 1981.

TWU argues that it has consistently expressed the view that the Prior Rights Agreement should be upheld based on three considerations. First, TWU states that it was implausible that its membership would ever ratify the elimination of prior rights. *Loew v. Conrail*, _____ F.

Supp. _____ (N.D. Ohio 1985). Second, TWU contends that it did not attempt to alter the prior rights agreement because, if it did so without a membership ratification, it would be sued by its own members who [8] would be displaced by EL carmen. Finally, TWU says that it did not receive any complaints from its members about the prior rights system.

TWU also asserts—like BRC—that there was no conspiracy to close the EL yards in the Buffalo area. Instead, TWU says that all of the evidence in the record clearly shows that only Conrail was responsible for the yard closings, which were allegedly ordered solely for economic reasons. Because of the above, BRC asks for summary judgment as well as costs and fees of its defense.

Conrail's own arguments are not inconsistent with the rendition of the facts set out by the other two defendants. First, the company says that the facts show that it has always favored a straight "dovetailed" seniority system (that is, one solely based on total seniority, of the type favored by plaintiffs) and that it is willing to renegotiate the current seniority agreement so as to satisfy plaintiffs here. Second, Conrail says that the facts indicate that there was no conspiracy or any agreement whatsoever between Conrail and defendant unions concerning the disputed Prior Rights Agreement. Further, Conrail argues that the facts show that there was no conspiracy to close Conrail yards, but that Conrail acted unilaterally "based on economic and budgetary considerations."

[9] Based on all of the above, Conrail says that the Railway Labor Act requires that Conrail negotiate seniority matters only with authorized employee representatives and, therefore, could not and may not abrogate this duty by bargaining with plaintiffs regarding this matter. 42 U.S.C. §§151(a), 152. The company also states that it owes no duty to represent plaintiffs in a case like the present one and, therefore, cannot be held liable under that cause of action. *Cf., American Postal Workers Union v. American Postal Workers*, 665 F.2d 1096, 1108 (D.C. Cir. 1981). Finally, Conrail says that plaintiffs' conspiracy allegations must be dismissed because plaintiffs have shown no factual support for such. Moreover, Conrail says that, even if such a showing were made, it would not amount to a valid claim against Conrail, because the company clearly has a legal right to determine to close railroad yards under the Regional Rail Reorganization Act. *O'Mara v. Erie Lackawanna Railroad*, 407 F.2d 674, 679 (2d Cir. 1969), *aff'd sub nom., Czosek v. O'Mara*, 397 U.S. 25 (1970).

In response to the above arguments, plaintiffs now allege that they have raised genuine issues of material facts which preclude the granting of summary judgment to defendants. More specifically, plaintiffs argue that the deposition of W.D. Crawford, General Vice [10] President and National Legislative Representative of the BRC, taken on October 31, 1985, acknowledged that he participated in putting the disputed Prior Rights Agreement together, that he was unaware of any vote by the membership of BRC approving the Prior Rights

Agreement, and that no requests were made by BRC union officials to either Conrail or TWU to renegotiate the Prior Rights Agreement after Title V was repealed in 1981. In addition, plaintiffs say that Crawford acknowledged the interrelationship and dependency of the Prior Rights Agreement and Title V.

Plaintiffs also contend that Mr. Albert Terrigio, Vice President and Director of the Railroad Division of the Railroad Division of the TWU, testified that he had several "informal" conversations with Mr. Robert Shoemaker, General Chairman of BRC between 1978 and 1982, during which the issue of "dovetailing" and yard closings were discussed. Plaintiffs say that the mere fact that these meetings occurred establish questions of fact regarding a possible conspiracy between the unions (Item 51, pp. 7-8). Plaintiffs say that defendants have submitted nothing but self-serving declarations that "dovetailing" was opposed by other lodges, despite plaintiffs' numerous complaints.

Plaintiffs also say that defendants' unwillingness to renegotiate the prior rights issue while [11] this case is pending evinces their bad faith and hostility toward plaintiffs. In fact, plaintiffs submit that during the August 1983 BRC Convention, C.C. Bevins erroneously informed the delegates that "prior rights" were required by law and could not be negotiated (Item 23, Exh. DD).

Plaintiffs also allege that, after May of 1983, their appeals to its own unions were futile. They say that the decision of the Executive Board at the convention was a "sham," because dovetailing was never discussed among TWU officials prior to that meeting.

Appendix B—Decision of the United States District Court for the Western District of New York, July 9, 1986.

In furtherance of their argument that both unions did not represent their respective memberships fairly regarding the dovetailing issue, plaintiffs say that the deposition of George R. Bent, Senior Director of Labor Relations for Conrail, is illustrative. This testimony indicates that Conrail has always been in favor of "straight dovetailing" but that only one meeting was ever held—in March 1983—between TWU and BRC to discuss this issue. Plaintiffs contend that this is in sharp contrast with other situations where many hours of negotiations were engaged in by defendants to establish equitable dovetailing.

Plaintiffs also argue that the testimony of Mr. Joseph Palmer, Assistant Vice President of Labor Relations, supports their case. He personally believes that the Prior Rights Agreement is unfair.

[12] Finally, plaintiffs argue that D. H. Connelly, now Division Superintendent with Conrail, supports plaintiffs' claim with respect to the closure of the EL yards. He says that no studies of local economic conditions were ever done before decisions were made about particular railroad yard closures.

In light of all of the above, I believe that all of the defendants in this case are entitled to summary judgment at this time. The court has reviewed all the affidavits and depositions filed in support of the motion for summary judgment and has considered plaintiffs arguments. Under the circumstances, the BRC was under no obligation to attempt to renegotiate the prior rights agreement. Certainly, the TWU owed no obligation to the plaintiffs in this case.

Appendix B--Decision of the United States District Court for the Western District of New York, July 9, 1986.

From a review of all the materials, it appears without question that the decision to close the yards was made by Conrail management, and there is no evidence whatsoever of a conspiracy by the defendants in this case directed at the plaintiffs. The motion for summary judgment in behalf of all defendants is granted, and the complaint is dismissed. Defendant TWU's motion for costs and fees is denied.

[13] So ordered.

JOHN T. CURTIN
John T. Curtin
United States District Judge

Dated: July 9, 1986

APPENDIX C

Regional Rail Reorganization Act of 1973

Regional Rail Reorganization Act of 1973:

Title V, Section 505(a), Pub. L. No. 93-236, 87 Stat. 1012, 1015 (1974):

> A protected employee whose employment is governed by a collective-bargaining agreement will not, except as explicitly provided in this title, during the period in which he is entitled to protection, be placed in a worse position with respect to compensation, fringe benefits, rules, working conditions, and rights and privileges pertaining thereto.

Title V, Section 505(b), Pub. L. No. 93-236, 87 Stat. 1012, 1015 (1974) provides in relevant part:

> A protected employe, who has been deprived of employment or adversely affected with respect to his compensation, shall be entitled to a monthly displacement . . .

Title V, Section 505(c), Pub. L. No. 93-236, 87 Stat. 1012, 1016 (1974) provides in relevant part:

> The monthly displacement allowance provided for in subsection (b) of this section shall continue until the attainment of age 65 by a protected employee which five or more years of service on the effective date of this Act . . .

45 U.S.C. Section 701(b)(4) (1974):

> It is therefore declared to be the purpose of Congress in this Act to provide for the establishment of the Consolidated Rail Corporation, with enumerated powers and responsibilities.

APPENDIX D

Northeast Rail Services Act of 1981

Northeast Rail Services Act of 1981:

Title VII, Section 701(a)(1), Pub. L. No. 97-35, 95 stat. 661 (1981):

> The Secretary of Labor and the representatives of the various classes and crafts of employees of the corporation shall, not later than ninety days after the effective date of this title, enter into an agreement providing protection for employees of the corporation who were protected by the compensatory provisions of Title V of this Act immediately prior to the effective date of the Northeast Rail Services Act of 1981 and who are, or may be, deprived of employment by actions taken under this Act and the Northeast Rail Services Act of 1981. An employee shall be considered deprived of employment if unable to obtain a position with an acquiring railroad, or to obtain a position with the corporation, the National Railroad Passenger Corporation, or a commuter authority through the normal exercise of seniority or, in the case of a non-agreement employee, by written application.

Title VII, Section 701(d)(1), Pub. L. No. 97-35, 95 Stat. 661 (1981):

> The Agreement of the parties and the benefit schedule prescribed by the secretary under this section may not require the expenditure of funds in excess of the amount authorized to be appropriated under Section 713 of this Act, or provide benefits for any individual employee in excess of $20,000.00.

Appendix D—Northeast Rail Services Act of 1981.

Title VII, Section 702(a), Pub. L. No. 97-35, 95 Stat. 661, 662 (1981):

> The Corporation may terminate the employment of certain employees in accordance with this section, upon the payment of an allowance of $350.00 for each month of active service with the corporation or with a railroad in reorganization, but in no event may any such termination allowance exceed $25,000.00.

45 U.S.C. Section 797(a):

> (1) The Secretary of Labor and the representatives of the various classes and crafts of employees of the Corporation shall, not later than ninety days after the effective date of this title, enter into an agreement providing protection for employees of the Corporation who were protected by the compensatory provisions of title V of this Act (former USCS Section 771 et seq) immediately prior to the effective date of the Northeast Rail Service Act of 1981 and who are, or may be, deprived of employment by actions taken under this Act and the Northeast Rail Service Act of 1981 (45 USCS Section 1101 et seq). An employee shall be considered deprived of employment if unable to obtain a position with an acquiring railroad, or to obtain a position with the Corporation, the National Railroad Passenger Corporation, or a commuter authority through the normal exercise of seniority or, in the case of a nonagreement employee, by written application.

(2) If the parties are unable to reach agreement under paragraph (1) within ninety days, the Secretary of Labor shall, within thirty days after the expiration of such 90-day period, prescribe the benefit schedule.

45 U.S.C. Section 797(d):

(1) The agreement of the parties and the benefit schedule prescribed by the Secretary under this section may not require the expenditure of funds in excess of the amount authorized to be appropriated under section 713 of this Act (45 U.S.C.S. Section 7971), or provide benefits for any individual employee in excess of $20,000.00.

(2) No individual shall become eligible for benefits under this section after the last day of the eighteen-month period beginning on the date of transfer under section 401 or 404 of this Act (45 USCS Section 761 or 764).